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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1985

No.

TOWN OF BELMONT,
Petitioner

v.

ELIZABETH DOLE, SECRETARY OF THE
UNITED STATES
DEPARTMENT OF TRANSPORTATION,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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QUESTION PRESENTED

In refusing to find whether or not there is a feasible and prudent alternative to building a highway through an archaeological district listed in the National Register of Historic Places, has the Secretary of Transportation violated federal highway statutes?

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PARTIES BELOW

At the United States Court of Appeals for the First Circuit, Defendant/Appellant was Elizabeth Dole, Secretary of the United States Department of Transportation; and Plaintiffs/Appelles were the Towns of Belmont (N.H.) and Tilton (N.H.). Amicus curiae briefs favoring the Secretary's position were filed by the States of Hawaii, Virginia, Illinois, and Pennsylvania.

OPINIONS BELOW

The First Circuit's opinion is reported at 766 F.2d 28, and appears in the Appendix (see p.11). The First Circuit reversed the decision of the United States District Court for the District of New Hampshire; the District Court's opinion was not generally reported, but appears in the Appendix (see p.23).

JURISDICTION

The judgment of the First Circuit was dated and entered on June 27, 1985; no rehearing was sought. This petition has been brought within ninety days of that judgment. The Supreme Court has jurisdiction under 28 U.S.C. §1254(1).

STATUTES AND REGULATION INVOLVED

The principal statutes involved are §18(a) of the Federal-Aid Highway Act of 1968 (23 U.S.C. §138), and a virtually identical provision, §4(f) of the Department of Transportation Act of 1966 as amended (49 U.S.C. §303); here these statutes will be referred to simply as §§18(a) and 4(f), the latter providing:

> (a) *It is the policy of the United States that special effort should be made to preserve* the natural beauty of the countryside and public park and recreation lands, wildlife and waterfowl refuges, and *historic sites.*
>
> * * *
>
> (c) *The Secretary may approve a transportation program or project requiring the use of* publicly owned land of the public park, recreation area, or wildlife and waterfowl refuge of national, State or local significance, or *land of an*

historic site of national, State or local significance (as determined by the Federal, State, or local officials having jurisdiction over the park, area, refuge, or site) *only if*–

(1) *there is no prudent and feasible alternative to using that land;* and

(2) the program or project includes all possible planning to minimize harm to the park, recreation area, wildlife and waterfowl refuge, or historic site resulting from the use. [Emphasis added.]

See the appendix (p.37) for the exact language of §18(a). A third statute involved is §106 of the National Historic Preservation Act of 1966 (16 U.S.C. §470f), which provides:

> The head of any Federal agency having direct or indirect jurisdiction over a proposed Federal or federally assisted undertaking in any State... shall, prior to the approval of the expenditure of any Federal funds on the undertaking... take into account the effect of the undertaking on any district, site, building, structure, or object that is included in or eligible for inclusion in the National Register. The head of any such Federal agency shall afford the Advisory Council on Historic Preservation... a reasonable opportunity to comment with regard to such undertaking.

The principal regulation involved is the Secretary of Transportation's archaeological regulation, 23 C.F.R. §771.135 (f)(1), which provides:

> Section 4(f) applies to all archeological sites on or eligible for inclusion on the National Register, including those discovered during construction, unless the [Federal Highway] Administration, after consultation with the State Historic Preservation Officer and the Advisory Council on Historic Preservation, determines that the archeological resource is important chiefly for the information it contains and has minimal value for preservation in place. Such archeological resources which do not warrant preservation in place may be recovered in accordance with a resource recovery plan developed in compliance with 36 C.F.R. Part 800.

STATEMENT OF THE CASE

Both §§18(a) and 4(f) provide in essence that the federal government should make a "special effort" to "preserve" historic sites and that these sites may not be used for transportation projects unless there is no "feasible and prudent alternative" to their use. Yet, without any attempt at all to look for a "feasible and prudent alternative," the Secretary of Transportation approved the building of a highway through and archaeological district listed in the National Register of Historic Places and located in the New Hampshire towns of Belmont and Tilton. The Secretary relied on her own archaeoligical regulation, which purports to allow her to avoid the statutory feasible-and-prudent-alternative requirement in certain cases. Believing the regulation invalid, the towns brought suit in the United States District Court for the District of New Hampshire, jurisdiction being based on 28 U.S.C. §1331 (federal question). Finding a violation of §§18(a) and 4(f), the District Court enjoined construction until there was statutory compliance, and struck down the regulation as void and contrary to §§18(a) and 4(f). The Secretary appealed, and the First Circuit reversed, holding that the regulation was not contrary to §§18(a) and 4(f) and was consistent with §106 of the National Historic Preservation Act of 1966.

In more detail, the essential facts are as follows. The Secretary approved the building of a new highway, 12 miles long and 4 lanes wide, from Franklin through Tilton and Belmont to Laconia, all municipalities in New Hampshire. The highway would be a bypass from the existing U.S. 3-N.H. 11. Within the path of the proposed bypass is the Lochmere Archaeological District, a 90-acre tract which in November 1982 was listed by the United States Department of Interior in the National Register of Historic Places as a district of State importance. As admitted by the Secretary, the District has prehistoric and historic significance, preserving 13 sites of prehistoric Native American occupation and 18 sites of Euro-American settlement and industry. Also as admitted by the Secretary, the District, in satisfaction of National Register criteria for evaluation (36 C.F.R. §60.4), evidences "[t]he quality of significance in American history, archaeology, ... and culture

[which] is present in *districts*... that possess integrity of location, design, setting, material, workmanship, feeling, and association, and... *that are associated with events that have made a significant contribuion to the broad patterns of our history*... [and] that have yielded, or may be likely to yield, information important in prehistory and history." (Emphasis added.) More particularly, the "*district* is significant for its *historical association* with the early settlement of Belmont and Tilton, and for its *association* with the early industrial use of New Hampshire's major rivers." (Emphasis added.)

The Secretary accepted a draft environmental impact statement (DEIS) in October 1977, and a final environmental impact statement (FEIS) in June 1981. Neither contained any statement analyzing whether there was a feasible and prudent alternative to the proposed highway. The explanation for the omission was that the proposed highway would "not use land of historic or archaeological significance" and "[t]herefore... the selected alignment... [would] not require a Section 4(f) evaluation." However, the Secretary later conceded that, "[a]lthough the listing of the Lochmere Archaeological District in the National Register of Historic Places occurred only as of November 1, 1982, the reasons for the listing -- its historic and archaeological significance -- were just as real and valid in October 1977, when the DEIS was accepted, and in June 1981, when the FEIS was accepted."

In any event, by letter of December 16, 1982, Belmont and Tilton told the Secretary of the District's listing in the National Register, and pointed out that "as a matter of law a Section 4(f) statement must now be prepared." That message was repeated by letter of April 7, 1983. However, despite the repeated warnings, the Secretary refused to prepare the statement, saying that under her archaeological regulation none was necessary.

The towns sued on May 9, 1983; the District Court's permanent injunction was entered on August 20, 1983; and the First Circuit's reversal was entered on June 27, 1985.

REASONS FOR GRANTING THE WRIT

THE FIRST CIRCUIT HAS DECIDED A FEDERAL QUESTION IN A WAY IN CONFLICT WITH APPLICABLE DECISIONS OF THIS COURT

Calling §§18(a) and 4(f) "clear and specific directives," this Court has said that the statutory "language is a plain and explicit bar for construction of highways through parks [and in this case, historic sites] -- only the most unusual situations are exempted." *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 411, (1971). The Court has further said:

> ...These statutes prohibit the Secretary of Transportation from authorizing the use of federal funds to finance the construction of highways through public parks [and here, historic sites] if a "feasible and prudent" alternative route exists. If no such route is available, the statutes allow him to approve the construction through parks [or historic sites] only if there has been "all possible planning to minimize harm" to the park [or historic site]. [At 405.]

Overton Park is unquestionably the leading case for construing §§18(a) and 4(f), and its holding was pressed hard by the appellee towns. Yet the First Circuit's decision does not even cite *Overton Park*, let alone follow it. The avoidance is total. The First Circuit said, however, "Before this court, appellees have argued vigorously that the [Secretary's archaeological] regulation departs from the 'plain meaning' of the statute. Their argument is a strong one." (Appendix, p.12). Much of that strength stems, of course, from *Overton Park*.

It stems also from the repeated expression of Congressional will. The very fact that §§18(a) and 4(f) are virtual duplicates of each other underscores the importance that Congress has attached to their substance. Moreover, §4(f), which was originally enacted in 1966, was reenacted without substantive change in 1983. See Pub. L. 97-449, Jan. 12, 1983, 96 Stat. 2419, recodified at 49 U.S.C. §303. Certainly, had Congress wished to weaken §4(f), it had, in this reenactment, a perfect opportunity to do so. That it in

fact did not, however, unmistakably confirms that the substance of § 4(f) continues in full vigor. Indeed, it is hard to imagine how Congress could have expressed itself more forcefully: it created not merely one statute, but two, imposing the feasible-and-prudent-alternative requirement; and, as if duplication were not enough, it then reenacted one of the statutes, giving this requirement, literally, a new vote of approval.

The Secretary's archaeological regulation, which took effect in 1980, utterly ignores one half of the statutes' "clear and specific directives." It avoids altogether the first of the two statutory conditions, wrongly treating the second one as if it were the only one. That is, the regulation has the Secretary bypass the feasible-and-prudent-alternative requirement, and go directly to the requirement for a plan to minimize harm to protected sites. Put simply, it has her go to second base without touching first.

The regulation wrongly implies that, as long as the Secretary has a minimizing-harm plan, she has the option of approving a project over a protected site even if there *is* a feasible and prudent alternative. As a matter of law, however, she has no such option. She has only an obligation: she may not approve any project over a protected site unless it is first established that there is *no* feasible and prudent alternative. If there is any, she must use it. If not, she may then, and only then, proceed to a minimizing-harm plan for use of the protected site. *Overton Park, supra* at 405.

Further proving the invalidity of the regulation is its reversal of statutory history. The regulation would undo the Congressional amendment that created § 18(a), and regress to the statute's original, weaker version. The predecessor of § 18(a) called only for a minimizing-harm plan, which included merely "consideration" of alternatives:

> ... [T]he Secretary shall not approve... any program for a project which requires the use for such project of any land from a Federal, State, or local government park or historic site unless such program includes all possible planning, including consideration of alternatives to the use of such land,

> to minimize any harm to such park or site resulting from such use. [Pub. L. 89-574, §15(a), Sept. 13, 1966, 80 Stat. 771.]

Contrast that version with the much tougher, current version (Pub. L. 90-495, §18(a), Aug. 23, 1968, 82 Stat. 823). By ignoring this current, strict version and regressing to the original, weaker version, the regulation purports to adopt what Congress has discarded. It thus diametrically contradicts Congressional will.

The First Circuit's decision overlooks not only vital precedent and statutory history, but also vital fact: the importance of Lochmere is "associational" as well as archaeological. The National Register of Historic Places Inventory Nomination Form provides for the following categories of classification: district, building, structure, site, and object. If the historic value of Lochmere were, as the First Circuit suggests, limited to its archaeological artifacts, then its National Register classification would have been under "objects." In fact, however, that was not the classification; as its name makes plain, the Lochmere Archaeological District was classified as a "district." It bears repeating, moreover, that the Secretary has admitted that the *District* has prehistoric and historic signifcance, preserving 13 *sites* of prehistoric Native American Occupation and 18 *sites* of Euro-American settlement and industry. Also as admitted by the Secretary, the *District,* in satisfaction of National Register criteria for evaluation, evidences "[t]he quality of significance in American history, archaeology,...and culture [which] is present in *districts* ... that possess integrity of location, design, setting, material, workmanship, feeling, and association, and ... *that are associated with events that have made a significant contribution to the broad patterns of our history.*" (Emphasis added.) More particularly, the "*district* is significant for its *historical association* with the early settlement of Belmont and Tilton, and for its *association* with the early industrial use of New Hampshire's rivers." (Emphasis added.) Referring to the National Register criteria quoted above, Mrs. Hoornbeek, an archaeologist for the United States Forest Service, testified as follows:

> To me Criterion A is a location, the district itself has been important in our history and prehistory. Not just the artifacts under the ground but rather the site itself is unique.

See *Benton Franklin Riverfront Trailway v. Lewis,* 701 F.2d 784, 788 (9th Cir. 1983) (The Secretary of Transportation's "reading of §4(f) is entirely too restrictive and lacks logic. There would be no sense in allowing the destruction and removal of structures on land and then determining whether the 'land' will be used by the proposed federal action. The land will often lose its historic significance once the object is removed. Hence, we conclude that the removal of the Old Truss Bridge... would be a use of 'land from an historic site' and therefore §4(f) of the Department of Transportation Act must be satisfied.")

Section 106 of the National Historic Preservation Act, on which the First Circuit relied, was not properly reconciled with §§18(a) and 4(f). The preservation statute is one of general application, relating to the head of "any" federal agency in "any" federally assisted undertaking. It requires the agency head to "take into account the effect of the undertaking on any district..." However, when applied to the Secretary of Transportation and properly reconciled with the much more specific provisions of §§18(a) and 4(f), the general requirement to "take into account" crystallizes into the specific requirement to look for feasible and prudent alternatives.

The Secretary's archaeological regulation simply casts aside the feasible-and-prudent-alternative requirement. So defying the statutes, it should not be upheld. This Court has "made it clear that 'The power of an administrative officer... to administer a federal statute and to prescribe rules and regulations to that end is not the power to make law... but the power to adopt regulations to carry into effect the will of Congress as expressed by the statute. A regulation which does not do this, but operates to create a rule out of harmony with the statute, is a mere nullity.' " *Dixon v. United States,* 381 U.S. 68, 74 (1965). An administrative agency may not "adopt regulations that are inconsistent with the statutory mandate... [I]ts 'interpretation' of the statute cannot supersede the

language chosen by Congress." *Mohasco Corp. v. Silver,* 447 U.S. 807, 825 (1980). See also *United States v. Larionoff,* 431 U.S. 864 (1977); *Ernst & Ernst v. Hochfelder,* 425 U.S. 185 (1976).

This case has national significance. The First Circuit observed that "the vast number of archeological sites that may exist in some areas (Hawaii, for example) suggests that the district court's view, if generalized, could significantly delay or halt road building, improvement, or maintenance in at least some states without significantly futhering any preservationist value." (Appendix, p.19.) It is, however, this same "vast number of archeological sites" that requires the preservation prescribed by Congress in §§18(a) and 4(f). That Congressional prescription – it must be stressed, finally – is not absolutist. It is not, "Never build here." It is, rather, moderate; it is, "If feasible and prudent, build elsewhere. If not, build here with appropriate plans to minimize harm." The First Circuit's suggestion of halts to road building is, therefore, overstatement. (Appendix, p. 19.) Its decision should be reversed, and the "clear and specific directives" of §§18(a) and 4(f) *(Overton Park, supra* at 411) should be followed.

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APPENDIX

UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

No. 83-1871

TOWN OF BELMONT, ET AL.,
Plaintiffs, Appellees,
v.
ELIZABETH DOLE, UNITED STATES SECRETARY OF TRANSPORTATION,
Defendant, Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW HAMPSHIRE
(Hon. Martin F. Loughlin, U.S. District Judge)

Before
Coffin, Breyer and Torruella,
Circuit Judges.

June 27, 1985

BREYER, *Circuit Judge.* Section 4(f) of the Department of Transportation Act says in part that the Secretary of Transportation may not approve a project

> requiring the use of... land of an historic site of national, State, or local significance (as determined by the Federal, State or local officials having jurisdiction over the ... site)

unless there is no "prudent and feasible alternative to using the land." 49 U.S.C. §303 (*See* Appendix for full text.) *See also* 23 U.S.C. §138. In October 1980 the Secretary promulgated a set of regulations that, in part, concerns historic sites of archeological value. The relevant paragraph said that

> archeological sites on or eligible for inclusion on the National Register [fall within the scope of §4(f)'s definition]... unless the Administration, after consultation with the state Historic Preservation Officer and the advisory Council on Historic Preservation, determines that the archeological resource is importatnt chiefly for the information it contains and has minimal value for preservation in place... [In that event the] archeological resources... may be recovered in accordance with a resource recovery plan developed in compliance [with a different set of regulations, contained in 36 C.F.R. Part 800]...

23 C.F.R. §771.135(f) (1) (1984). (*See* Appendix for full text). The issue in this case is whether this "archeological regulation" is consistent with the statute. The district court held that is was not, declared the regulation void, and issued an injunction based on that finding. Before this court, appellees have argued vigorously that the regulation departs from the "plain meaning" of the statute. Their argument is a strong one. Nonetheless, having looked into the matter in some depth, we conclude that the regulation does not conflict with the statute's language, properly understood, and that the "archeological regulation" in fact furthers the statute's preservationist goals. Hence, we reverse the district court's decision.

I
A

Since the district court, in effect, declared the regulation invalid on its face, we shall examine it in light of the government's version of the facts. They included the following: The federal Department of Transportation (DOT) and the New Hampshire Department of Public Works and Highways wish to build a twelve-

mile, four-lane bypass to relieve highway congestion along a corridor of U.S. 3-N.H. 11 between Franklin and Lcaonia, New Hampshire. The bypass route they have proposed runs through the towns of Tilton and Belmont. In 1977 they published a draft environmental impact statement. In 1976, 1978 and 1980 various federal and state officials involved with the highway project surveyed the proposed bypass route to determine whether it contained any "historic sites". As a result of the 1978 survey, New Hampshire found and created a special zone, the Lochmere Archeological District. The District consists of about 90 acres of land containing Indian and colonial settlement sites with buried artifacts but no historic buildings. As New Hampshire's State Preservation Officer wrote, when he successfully applied to have the National Park Service list the District in its National Register of Historic Places, the site's significance is "strictly archeological," consisting of the data it contains. DOT consulted relevant state and federal agencies, all of which have agreed with DOT about this characterization. DOT has agreed that

> [The state and federal highway agencies] will develop an appropriate data recovery program, which meets the approval of the NH State Historic Preservation Office and Advisory Council on Historic Preservation, for any sites determined to be eligible for inclusion in the National Register.
>
> [The state and federal highway agencies] will conduct the data recovery at the earliest possible date under the supervision of an archeologist whose qualifications have been determined acceptable by the State Historic Preservation Office.

Together with DOT, these agencies are now developing a satisfactory "retrieval" plan that will preserve significant data and artifacts, though not necessarily where now buried.

B.

In considering the "archeological regulation's" lawfulness, it is important to keep in mind the following 'legislative' background: DOT promulgated the regulation pursuant to its general rulemaking power to implement Congressional transportation

statutes, *see* 23 U.S.C. §315. DOT intended the regulation to further, not only the purposes of §4(f), but also those of a different statute (enacted the same day as §4(f), the National Historic Preservation Act of 1966, 16 U.S.C. §§470 *et seq.* Section 106 of that Act requires DOT (and other federal agencies) to "take into account the effect" of any "undertaking on any district, site, building, structure or object that is included in or eligible for inclusion in the National Register," and to give the "Advisory Committee on Historic Preservation... a reasonable opportunity to comment" on the "undertaking." *Id.* §470f. (*See* Apendix for full text.) When promulgating its "archeological regulation," DOT explained how it reconciled and fulfilled the purposes of both §4(f) and the Preservation Act, as follows:

> A related problem has arisen with respect to archeological sites which are treated as historic sites under both section 4(f) and the National Historic Preservation Act. Frequently, the consultation required by section 106 [of the NHPA, 16 U.S.C. §470f] results in a determination that data recovery is the appropriate form of mitigation for the archeological site. Such determinations are typically made when the recovery of the material contained in or on the site renders more valuable information than leaving such material at the specific location. Applying section 4(f) to archeological sites where data recovery is appropriate would impose the section 4(f) test to sites for which all interested agencies have agreed that removal of the archeological material is in the best public interest. This regulation incorporates current DOT policy by applying section 106 and section 4(f) to archeological sites sequentially. If data recovery under section 106 is appropriate, then section 4(f) would not apply, since recovery results in the removal of materials which make the site significant for purposes of section 4(f). It should be noted that section 4(f) continues to apply to archeological sites on or eligible for the National Register where the site has significance for reasons other than the materials contained.

45 Fed. Reg. 71,976 (1980). The "archeological regulation" thus says in essence that DOT, in accordance with procedures set out elsewhere (in 36 C.F.R. Part 800) will consult with state and

federal preservation officials, both to determine the applicability of its "archeological regulation" and to develop an appropriate retrieval plan. *See* 36 C.F.R. Part 800(1984)(implementing the Preservation Act). DOT promulgated the initial version of this regulation in 1980, as part of a far larger proposed regulation dealing with §4(f). DOT apparently received 196 comments from interested parties. 45 Fed. Reg. 71,968 (1980). DOT then summarized and discussed significant comments when promulgating the final regulation. Judging from this discussion, no environmental group or archeological group seriously opposed the "archeological regulation" subsection.

C.

Our task on this appeal is to determine the lawfulness of an agency's "legislative rule" – a rule that is lawful if "reasonable" and not "contrary" to the relevant statutes. *Schweiker v. Gray Panthers*, 453 U.S. 34, 43-44 (1981); *Batterton v. Francis*, 432 U.S. 416, 424-26(1977); *Mayburg v. Secretary of Health and Human Services*, 740 F.2d 100, 106 (1st Cir. 1984); *see generally* 2K. Davis, *Administrative Law Treatise* §7:8(1979). We consider that rule in light of the factual assumptions set forth in part IA, above, namely that DOT and others have fully complied with the rule and with related regulations. Indeed, we consider its lawfulnes on the still more favorable assumption that the relevant State official "having jurisdiction" (The State Historic Preservation Officer), the relevant federal preservationist agencies (including the Advisory Committee on Historic Preservation established under the Preservation Act), and DOT all agree about both the regulation's applicability and the likely creation of a satisfactory "retrieval" plan. We also consider the rule in light of its history set forth in part IB above, namely that the regulation is aimed at serving the purposes of both §4(f) and the Preservation Act.

II

Given our assumptions, we conclude that the "archeological regulation" is lawful. It is consistent with §4(f), because neither the language nor the purpose of that section requires DOT to determine whether there exists a "prudent and feasible" alternative to use of the land that the regulation describes. Thus §4(f) does not require DOT to choose any such alternative route instead of the land in question.

First, as a matter of language, we fail to find any necessary conflict between statute and regulation. The statute applies to "the use of... land of an historic site of national, State, or local significance." The regulation picks out those archeological sites whose significance lies only in the data they contain that will be at least equally well preserved outisde the site. Once the data is removed, the land lacks the necessary "significance." The process of removal itself cannot be considered an *adverse* "use" of the site as long as it does not injure but preserves the objects in question. And, the word "use" in the statute referes to a use that is *adverse* in terms of the statute's preservationists purposes, a "use" that might *"harm"* the resources the statute seeks to protect, 49 U.S.C. §303(c)(2) (emphasis added). See *Adler v. Lewis,* 675 F.2d 1085, 1092 (9th Cir. 1982) ("the term 'use' is... not limited to the concept of physical taking, but includes areas that are significantly adversely affected by the project"); *D.C. Federation of Civic Associations v. Volpe,* 459 F.2d 1231, 1239 (D.C.Cir.) ("harm" to recreational park under §4(f) encompasses "noise, air pollution and general unsightliness" that might "dissipate its aesthetic value, crush its wildlife [or] defoliate its vegetation") *cert. denied* 405 U.S. 1030 (1972); *Nashvillians Against I-440 v. Lewis,* 524 F. Supp. 962, 976 (M.D. Tenn. 1981) (constructive "use" of historic property under §4(f) "occurs only where the claimed harm will affect the *historic* value or quality of the properties" and where "the purposes for which such properties are protected [are] threatened by the 'use')" (emphasis in original). Indeed, a contrary view of the word "use" would perversely forbid DOT from helping to preserve the environment in any instance in which a project helps, rather than hurts, the envornment. (Imagine a DOT project planting trees along the edge of a port, or reconstructing a bridge so

as to help free an estuary of pollution making it better fit for wildlife.) *Cf. Trans Alaska Pipeline Rate Cases,* 436 U.S. 631, 643 (1978) ("in interpreting the words of a statute," courts have "some scope for adopting a restricted rather than a literal or usual meaning of words where acceptance of that meaning would lead to absurd results... or would thwart the obvious purpose of the statute")

Second, the regulation is consistent with the purpose of §4(f) – a purpose described in its opening sentence as requiring the United States to make a "special effort... to preserve the natural beauty of the country-side and public parks and recreation lands, wildlife and waterfowl refuges, and historic sites." 49 U.S.C. §303(a). *See generally,* Gray, *Section 4(f) of the Department of Transportation Act,* 32 Md. L. Rev. 327 (1973). As courts and commentators have noted, historic sites, particularly archeological sites, raise special problems, for unlike sea, parks and recreation lands, many of them are in private hands, see *Stop H-3 Association v. Coleman,* 533 F.2d 434, 442 n.15 (9th Cir.) *cert. denied,* 429 U.S. 999 (1976); and private owners are not necessarily obligated to preserve the sites' historic or archeological value. *See, e.g.,* Lovis, "A Case Study of Construction Impacts on Archeological Sites in Michigan's Inland Waterway," *Journal of Field Archeology* (1978) (in area studied, only two percent of the destruction of all archeological sites was due to federal program; thirty-eight percent, to commercial ventures; and the rest, to other private developers). Choosing an "alternative" route for a road in order to avoid a public park in all likelihood helps to preserve the park; choosing an "alternative" route for a road in order to avoid an archeological site may well harm the site, at least where the site's only value lies, say, in its buried artifacts, where road building is acompanied by a carefully designed plan to retrieve them, and where the alternative is to leave the site in the hands of private owners free to ignore, or even to harm, its archeological value.

Recognizing this fact, DOT, the Advisory Council on Historic Preservation, and state preservationist agencies have developed an archeological preservationist program, embedded in regulations promulgated pursuant to the Historic Preservation Act,

see 36 C.F.R. Part 800(1984) and the regulation at issue here. We are told by four states filing amicus briefs that this program works well. Pennsylvania, for example, in a brief signed by both counsel to its Department of Transportation and counsel to its Historical and Museum Commission, notes that the state contains over 11,000 archeological sites, and explains how the federal program has helped to advance archeological objectives. It concludes,

> The recovery program created by the Advisory Council Regulations [36 C.F.R. Par 800], which are necessarily triggered by [the "archeological regulation"] has operated successfully in Pennsylvania, fostering cooperation between the Department of Transportation and the Historical and Museum Commission and serving the needs and objectives of both agencies.

To strike down the "archeological regulation" as contrary to §4(f) would have the perverse effect of interfering with §4(f)'s preservationist objective, for it would forbid DOT to help retrieve and preserve the buried artifacts as long as the road could be put elsewhere. The state of Illinois, in its amicus brief, describes the possibility as follows:

> If the District Court's decision is upheld, the Department will, no doubt, be faced with the anomalous situation of discovering a significant site which should be salvaged so that the information it contains can be professionally collected, published, and displayed. Instead of completing this task and contributing to the body of knowledge associated with archeology, the Department will be faced with the mandate of Section 4(f) to avoid the site unless no feasible and prudent alternative exists. If such an alternative is found, the site will then be abandoned. The site will be left, in most cases, in private ownership with no absolute restraints against total destruction or vandalism...

If the District Court's decision is not reversed, the Department will be required to shift the focus in its archeological program from its present standard of maximum preservation of valuable

information to one of finding significant sites so that they can be avoided and possibly ruined. Instead of serving the historical preservation goal stated in Section 4(f), the Department would be assisting in the loss of irreplaceable archeological resources.

Even if this dismal picture is overdrawn, the vast number of archeological sites that may exist in some areas (Hawaii, for example) suggests that the district court's view, if generalized, could significantly delay or halt road building, improvement, or maintenance in at least some states without significantly furthering any preservationist value. (Here, for example, appellee townships, while anxious to stop the road, have no particular expertise or institutional interest in archeological preservation.)

Third, the "archeological regulation," viewed in the context of its accompanying and cross-referenced regulations promulgated under the Preservation Act, *see* 36 C.F.R. Part 800 (1984), contains, as we interpret it, sufficient substantive and procedural safeguards to prevent its being applied in a manner that would undercut its, and §4(f)'s, preservationist goals. It does not apply and §4(f) does apply, for example, if the archeological items give a particular site a special "in place" historical or archeological significance. (Consider, for example, the Civil War battle artifacts at Gettysburg.) The regulation also would not apply if it turns out that the related agencies cannot develop a "resource recovery plan" that would remove and preserve the significant items. Finally, we consider here the regulation as applied to a site where *"all"* state and federal officials with "jurisdiction" *agree* that site meets the regulation's definition. (DOT says that they are in agreement; and the district court struck down the regulation on that assumption). We need not now decide how, or whether, the regulation can apply should DOT, for example, believe the site's archeological elements lack "in place" value but the State Historical Preservation Officer or the Advisory Committe on Historic Preservation disagrees. (We note authority, however, for the proposition that a claim by *one* of the state or federal officials with jurisdication that a particular site falls within §4(f)'s scope is sufficient to invoke the protection of that statute, *Stop H-3 Association v. Coleman*, 533 F.2d at 441-42).

III

We note that appellees seek to dispute one of our factual assumptions. They argue that DOT has not fulfilled the requirements laid down in the "archeological regulation" and related regulations. DOT replies that it has done so. The record is consistent with DOT's claim. Nonetheless, this is a matter the district court should consider in the first instance.

The decision of the district court is

Reversed and the case is remanded for proceedings consistent with this opinion.

APPENDIX

Section 4(f) of the Department of Transportation Act, 49 U.S.C. §303:

§303. Policy on lands, wildlife and waterfowl refuges, and historic sites

(a) It is the policy of the United States Government that special effort should be made to preserve the natural beauty of the Country-side and public park and recreation lands, wildlife and waterfowl refuges, and historic sites.

(b) The Secretary of Transportation shall cooperate and consult with the Secretaries of the Interior, Housing and Urban Development, and Agriculture, and with the States, in developing transportation plans and programs that include measures to maintain or enhance the natural beauty of lands crossed by transportation activities or facilities.

(c) The Secretary may approve a transportation program or project requiring the use of publicly owned land of a public park, recreation area, or wildlife and waterfowl refuge of national, State, or local significance, or land of an hisotric site of national, State, or local significance, or land of an historic site of national, State or local significance (as determined by the Federal, State, or local officials having jurisdiction over the park, area, refuge, or site) only if —

(1) there is no prudent and feasible alternative to using that land, and

(2) the program or project includes all possible planning to minimize harm to the park, recreation area, wildlife and waterfowl refuge, or historic site resulting from the use.

Section 106 of the National Historic Preservation Act of 1966, 16 U.S.C. §470f:

§470f. Effect of Federal undertakings upon property listed in National Register; comment by Advisory Council on Historic Preservation

The head of any Federal Agency having direct or indirect jurisdiction over a proposed Federal or federally assisted undertaking in any State and the head of any Federal department or independent agency having authority to license any undertaking shall, prior to the approval of the expenditure of any Federal funds on the undertaking or prior to the issuance of any license, as the case may be, take into account the effect of the undertaking on any district, site, building, structure, or object that is included in or eligible for inclusion in the National Register. The head of any such Federal agency shall afford the Advisory Council on Historic Preservation established under sections 470i and 470n of this title a reasonable opportunity to comment with regard to such undertaking.

DOT's "Archeological Regulation," 23 C.F.R. 771. 135(f) (1984):

(f)(1) Section 4(f) applies to all archeological sites on or eligible for inclusion on the National Register, including those discovered during construction, unless the Administration, after consultation with the State Historic Preservation Officer and the Advisory Council on Historic Preservation, determines that the archeological resource is important chiefly for the information it contains and has minimal value for preservation in place. Such archeological

resources which do not warrant preservation in place may be recovered in accordance with a resource recovery plan developed in compliance with 36 CFR Part 800.

(2) For sites discovered during construction, where preservation of the resource in place is warranted, the Section 4(f) process will be expedited. In such cases, the evaluation of feasible and prudent alternatives will take account of the level of investment already made and the review process, including the consultation with other agencies, will be shortened as appropriate.

THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW HAMPSHIRE

Town of Belmont, et al.
v.
Elizabeth Dole, et al.
#C83-241-L

ORDER

In recent years, concerted efforts have been made to preserve this nation's heritage as reflected in historical sites of national, state and local significance. The Congress has declared the preservation of such sites to be a matter of national policy and has enacted various statutes designed to halt their needless and sometimes wanton destruction. In this case, the Court is primarily concerned with two such statutes, specifically §4(f) of the Department of Transportation Act of 1966, as amended, 49 U.S.C. §303[1] and §18(a) of the Federal-Aid Highway Act of 1968, as amended, 23 U.S.C. §138[2].

Succintly, these statutes prohibit the Secretary of Transportation from authorizing federal funds to finance the construction of a highway through an historic site if a prudent and feasible alternative can be found. If no such alternative can be found, the statutes require all possible planning to minimize harm to the historic site.

The towns of Belmont and Tilton, New Hampshire (plaintiffs) seek an injunction to block construction of a proposed bypass of US 3-NH 11 through the Lochmere Archaelogical District until such time as Secretary of Transportation Elizabeth Dole, in compliance with §4(f), determines that there is no prudent and feasible alternative to the use of land from the District. The Lochmere Archaelogical District has been

1 §4(f) of the Department of Transportation Act was originally codified as 49 U.S.C. §1653(f). Section 7 (b) of Pub. L. 97-449, January 12, 1983, 95 Stat. 2444 repealed 49 U.S.C. §1653 (f) and recodified that statute—without substantive change – as 49 U.S.C. §303.

2 Whereas 49 U.S.C. §303 and 23 U.S.C. §138 utilize essentially identical language, and, whereas, a violation of one statute is also a violation of the other, the court will hereinafter refer to both statutes as "section 4(f)", the term commonly used by other courts and agencies.

included on the National Register of Historic Places since November of 1982.

The Secretary of Transportation maintains that she is not required to make a determination that there is no prudent and feasible alternative to the use of land from the Lochmere District. Defendant's position is grounded upon 23 C.F.R. §771.135(f)(1) which provides that §4(f) does not apply to historic sites primarily important for the information or artifacts they contain when the Secretary of Transportation – after consultation with the State Historic Preservation Officer and the Advisory Council for Historic Preservation – determines that preservation of the site in place is not warranted. The plaintiffs have requested a declaratory judgment to the effect that 23 C.F.R. §771.135 (f)(1) is void.

Simply stated, the primary issue before this Court is whether §4(f) was intended to protect the Lochmere Archaeological district, an historic site primarily important for the archaeological artifacts it contains. Jursidiction is based upon 28 U.S.C. §1331.

I. FACTUAL BACKGROUND

The proposed bypass of US 3-NH 11 represents the culmination of nearly thirty years of planning. The bypass is considered necessary to alleviate congestion on the current roadway and to prevent the sometimes fatal accidents which can occur as a result of that congestion. The project, as proposed, would supplement the existing US 3-NH 11 roadway with a four-lane limited-access highway through a generally rural area. Within the particular "corridor" selected for the bypass, numerous routes have been considered, but, from the evidence presented, it appears all roads led to Lochmere.

A draft Environmental Impact Statement on the project was published in 1977. In the interim from publication of that Draft through preparation of the Final Enviromental Impact Statement, various state and federal officials involved with the project attempted to ascertain whether there were any historic properties along the proposed route which would require the preparation of a

"§4(f) statement". Intensive surveys were conducted in the area of Lochmere in 1976, 1978, and 1980. As a result of the 1978 survey, a 500 foot wide zone starting at the tip of Winnisquam Lake and extending to and along Silver Lake was nominated for inclusion in the National Register of Historic Places in 1980.

The significance of the Lochmere Archaelogical District is, according to the nomination forms, strictly archeological. The District preserves thirteen sites of prehistoric Native American occupation and eighteen sites of Euro-American settlement and industry. There are no historic buildings within the District. Rather, it is dotted with abandoned cellarholes (some of which are only visable when the water is low) and various stone artifacts. The District is hardly in a pristine state. "Areas of major disturbance" include "house lots, landscaped areas, railroad cut and fill, powerlines and roads; a new hydro-electric facility on the east side of the river is now under construction by state and federal agencies." National Register Nomination Forms, continuation sheet #14, Item 7, page 14.

In a letter addressed to Duncan Pearson, Highway Design Engineer for the New Hampshire Department of Public Works and Highways, State Historic Preservation Officer George Gilman wrote in regards to the Lochmere District:

> Although the site within the proposed corridor is potentially eligible for the National Register of Historic Places, and has been included in an Archaeological District Nomination, it is the opinion of the Historic Preservation Office that the significance of the site will lie in the data it contains and retrieval of the data is the recommended course of action... I request that this determination be construed as a finding of "no adverse effect on archeological resources".

State Historic Preservation Officer Gilman's determination was conditioned upon the New Hampshire Department of Public Works and Highways and the Federal Highway Administration including four commitments in the Final Environmental Impact Statement for the project; the gist of those commitments involved the recovery of historically significant artifacts from the

District prior to construction on the bypass. Those commitments were, in fact, included in the Final Environmental Impact Statement.

In a letter dated December 30, 1980, Mr. F.T. Comstock, Jr., Division Administrator of the United States Department of Transportation, wrote in response to Mr. Gilman's letter:

> We concur, based on available information and the State Historic Preservation Officer's position, that a finding of "No Adverse Effect" is appropriate and that Section 4(f) would not be applicable.

The Final Environmental Impact Statement for the project was completed in June, 1981. That statement concluded that there were no properties within the route of the proposed bypass which would require preparation of a section 4(f) statement. The Final Environmental Impact Statement further concluded that construction of the bypass would have no adverse effect on archeological resources if an appropriate resource recovery program was implemented prior to construction in the Lochmere District.

Eighteen months after the Final Environmental Impact Statement was completed, the Secretary of the Interior added the Lochmere Archaelogical District to the National Register of Historic Places.

Plaintiffs filed suit in this court on May 9, 1983. They seek to enjoin further work on the project until such time as the Secretary of Transportation, in compliance with section 4(f), determines that there is no prudent and feasible alternative to the use of land from the District. Insofar as the Secretary of Transportation has refused to conduct a section 4(f) study and has grounded her refusal on 23 C.F.R. §771.135 (f)(1), the plaintiffs' have also requested a declaratory judgment to the effect that regulation is void.

II. DISCUSSION

A.

As this case revolves around the disputed applicability of section 4(f), the court begins its discussion with an examination of the statutory language itself. Section 4(f) provides, in full:

> (a) It is the policy of the United States Government that special effort should be made to preserve the natural beauty of the countryside and public park and recreation lands, wildlife and waterfowl refuges, and historic sites.
>
> (b) The Secretary of Transportation shall cooperate and consult with the Secretaries of the Interior, Housing and Urban Development, and Agriculture, and with the States, in developing transportation plans and programs that include measures to maintain or enhance the natural beauty of lands crossed by transportation activites or facilities.
>
> (c) The Secretary may approve a transportation program or project requiring the use of publicly owned land of a public park, recreation area, or wildlife and waterfowl refuge of national, State, or local significance, or land of an historic site of national, State or local significance (as determined by the Federal, State, or local officials having jurisdiction over the park, area, refuge, or site) only if —
>
> (1) there is no prudent and feasible alternative to using that land; and
>
> (2) the program or project includes all possible planning to minimize harm to the park, recreation area, wildlife and waterfowl refuge, or historic site resulting from the use.

49 U.S.C. §303

Similarly, section 18(a) of the Federal-Aid Highway Act of 1968 provides, in essentially identical language:

> It is hereby declared to be the national policy that special effort should be made to preserve the natural beauty of the country wise and public park and recreational lands,

wildlife and waterfowl refuges, and historic sites. The Secretary of Transportation shall cooperate and consult with the Secretaries of the Interior, Housing and Urban Development, and Agriculture, and with the States in developing transportation plans and programs that include measures to maintain or enhance the natural beauty of the lands transversed. After the effective date of the Federal-Aid Highway Act of 1968, the Secretary shall not approve any program or project which requires the use of any publicly owned land from a public park, recreation area, or wildlife or waterfowl refuge of national, State, or local officials having jurisdiction thereof, or any land from an historic site of national, State, or local significance as so determined by such officials unless (1) there is no feasible and prudent alternative to the use of such land, and (2) such program includes all possible planning to minimize harm to such park, recreation area, wildlife and water fowl refuge, or historic site.

23U.S.C. §138.

Section 4(f), embodied as it is in the very enabling legislation which established the Department of Transportation and delineates the scope of Secretary Dole's authority, can only be read as imposing an explicit limitation on her powers to act where the consequences of her actions would result in the use of land from "protected" properties. Both section 4(f) and section 18(a) provide "clear and specific directives" to this effect. *Citizens to Preserve Overton Park v. Volpe,* 401 U.S. 402, 411 (1971). Thus, whenever a federal, state or local official with the jurisdiction to do so designates a particular area as an historic site, the Secretary of Transportation is prohibited from approving a federally funded project which would require the use of land from that historic site until she first prepares a section 4(f) statement concluding that there is no prudent and feasible alternative to the use of that land. The language of the statute is clear, unambiguous, and does not lend itself to any other interpretation.

Citizens to Preserve Overton Park v. Volpe, supra, involved the proposed construction of a highwy through a public park. Referring to section 4(f) – which affords the same protection to both parks and historic sites – the Supreme Court wrote, "this language is a plain and explicit bar to the use of federal funds for construction of highways through parks – only the most unusual situations are exempted." 401 U.S. 401, 411 (1971). Likewise, the Ninth Circuit has written that "under section 4(f)'s disjunctive language, if any of the officials having jurisdiction to determine that a site has national, State, or local historic significance, so decides then section 4(f) applies." *Stop H-3 Ass'n v. Coleman,* 533 F.2d 434, 441 (9th Cir. 1976). See also *Coalition for Canyon Preservation v. Bowers,* 632 F.2d744 (9th Cir. 1980); *Coalition for Responsible Regional Development v. Brinegar,* 518 F.2d 522 (9th Cir. 1975).

There can be no doubt that the Secretary of the Interior is an official with the jurisdiction to determine that a site has national, State, or local historical significance. Towards implementing our national policy of historic preservation, Congress has authorized the Secretary of the Interior to "expand and maintain a national register of districts, sites, buildings, structures and objects significant in American history, architecture, archeology, and culture, hereinafter referred to as the National Register." 16 U.S.C. §470 (a)(1). The National Register serves as a "convenient guide to properties which should be preserved." H.R. Rep. No. 1916, 89th Cong., 2d Sess., reproduced at 1966 U.S. Code Cong. & Admin. News pp. 3307, 3310.

The Secretary of the Interior, in turn, has promulgated "National Register Criteria" to determine the eligibility of particular properties nominated for inclusion on the National Register. In part, those criteria provide as follows:

> The quality of significance in American history, architecture, archaeology and culture is present in districts, sites, buildings, structures and objects of State and local importance that possess integrity of location, design, setting, materials, workmanship, feeling and association and:

(a) That are associated with events that have made a significant contribution to the broad patterns of our history; or

(b) That are associated with the lives of persons significant in our past; or

(c) That embody the distinctive characteristics of type, period, or method of construction, or that represent the work of a master, on that represent a significant and distinguishable entity whose components may lack individual distinction; or

(d) That have yielded, or may be likely to yield, information important in prehistory or history.

36 C.F.R. §60.6

In the instant case, the Secretary of the Interior determined that the Lochmere Archaeological District satisfied the first and fourth of those criteria and so approved its inclusion on the National Register as an historic site of State significance. "Since the Interior Secretary is the only official authorized to name properties to the National Register, we have no doubt that he has 'jurisdiction' to determine whether properties have state or local historic significance." *Stop H-3 Ass'n v. Coleman, supra,* at 441.

Having concluded that the Secretary of the Interior is an official with jurisdiction to determine that a site has historical significance and that he has, in fact, made such a determination in the instant case, it would appear that the operative language of section 4(f) has been satisfied and that section 4(f) applies to the Lochmere Archaeological District. At this point, the court turns to examine 23 C.F.R. §771.135 (f)(1) to determine whether that regulation somehow alters or upsets this analysis.

B.

23U.S.C. §315 authorizes the Secretary of Transportation to promulgate all rules and regulations necessary to carry out her multitudinous duties. Pursuant to that grant of authority, 23 C.F.R. §771.135 (f)(1) was promulgated in December 1980. That regulation provides:

> Section 4(f) applies to all archaeological sites on or eligible for inclusion on the National Register, including those discovered during construction, unless the Administration, after consultation with the state Historic preservation Officer and the advisory Council on Historic Preservation, determines that the archaeological resource is important chiefly for the information it contains and has minimal value for preservation in place. Such archaeological resources which do not warrant preservation in place may be recovered in accordance with a resource recovery plan developed in compliance with 36 C.F.R. Part 800.

Plaintiffs' challenge to the validity of 23 C.F.R. §771.135 (f)(1) is a case of first impression. As with any regulation promulgated by an executive department pursuant to a grant of authority from the Congress, 23 C.F.R. §771.135 (f)(1) is presumptively valid and entitled to judicial deference. *Hoffenberg v. Kaminstein,* 396 F.2d 684 (C.A.D.C. 1968), *certiorari denied,* 393 U.S. 913. For the purpose of ruling on the disputed validity of this regulation, the regulatin must be measured against the Act of Congress it was designed to implement.

> Where the empowering provision of a statute states simply that the agency may "make... such rules and regulations as may be necessary to carry out the provisions of this Act," we have held that the validity of a regulation promulgated thereunder will be sustained so long as it is reasonable related to the purposes of the enabling ligislation. *Thorpe v. Housing Authority of the City of Durham,* 393 U.S. 168, 280-281 (1969). See also, *American Trucking Assn's v. United States,* 344 U.S. 298 (1953).

Mourning v. Family Publications Service, Inc, 411 U.S. 356, 369 (1973). Conversely, "a regulation which operates to create a rule out of harmony with the statute is a mere nullity." *Pacific Gas & Electric Co. v. United States*, 644 F.2d 1133, 1136 (9th Cir. 1981). See also, *Manhattan General Equipment Co. v. Commissioner of Internal Revenue*, 297 U.S. 129, 134 (1935); *General Electric v. Gilbert*, 425, U.S. 125, 140-142 (1976); *Security and Exchange Commission v. Sloan*, 436 U.S. 103 (1978)

The court has already noted its belief that the Secretary of the Interior's decision to include the Lochmere Archaeological District on the National Register of Historic Places invokes all of the protections section 4(f) was designed to afford. Insofar as the Secretary of Transportation's regulation would act, in this case, to strip the District of those protections and relieve the Secretary of Transportation from preparing the type of statement section 4(f) requires, the regulation is not only "out of harmony" with the Act of Congress, it is in direct opposition to the Act. This is not to say that the regulation is entirely illogical or without merit, for if the validity of a regulation were to be decided on the basis of its sensibilities 23 C.F.R. §771.135 (f)(1) might well pass. However, the regulation is in conflict with the judgment of the Congress as expressed in the language of section 4(f) and would act to circumvent an explicit limitation imposed on the Secretary of Transportation's authority by the Congress; as such, the regulation must be considered void.

III

Plaintiffs have requested relief in the form of a permanent injunction and a declaratory judgment. The decision to grant either a permanent injunction or a declaratory judgment is one which is committed to the sound discretion of the court. See *Lemon v. Kurtzman*, 411 U.S. 192 (1973) and *Brillhart v. Excess Ins. Co. of America*, 316 U.S. 491 (1942).

The permanent injunction represents the strong arm of this court's equity jurisdiction. The primary prerequisite for the issuance of such an injunction is a finding that the plaintiff is being

threatened by some injury for which he has no adequate legal remedy. Wright & Miller, *Federal Practice and Procedure:* Civil §2942. "The injury contemplated must be real, not fancied; actual, not prospective; and threatened, not imagined." *Association of Professional Personnel v. Radio Corp. of America,* 183 F. Supp. 834, 839 (D.C.N.J. 1960). Other interests must be balanced, among them, the hardship on the plaintiff if relief is denied as opposed to the hardship to the defendant if it is granted. Wright & Miller, *Federal Practice and Procedure:* Civil §2942. Having considered all the evidence presented, this court concludes that the proposed bypass of US-3 NH 11 constitutes a real threat of irreparable injury to the Lochmere Archaeological District. Accordingly, a permanent injunction, attached to this opinion, shall be issued.

It is now long settled that in proper circumstances this court is empowered to render a declaratory judgment. *Aetna Life Ins. Co. v. Haworth,* 300 U.S. 227 (1937). Again, the decision whether to render such a judgment is one squarely committed to the discretion of the court. *Brillhart v. Excess Ins. Co. of America, supra.* A declaratory judgment is only proper in those instances where a real case or controversy is present. *Aetna Life Ins. Co. v. Haworth, supra; Eccles v. People's Bank of Lakewood Village,* 333 U.S. 426 (1948); *Golden v. Zwickler,* 394 U.S. 103 (1969). The court is satisfied that the instant case presents a real "case or controversy" as those words are used in Article of the United States Constitution. Whereas the federal defendants have grounded their defense of this action almost exclusively on the professed validity of 23 C.F.R. §771.135 (f)(1), the court has no alternative but to rule on the merits of that regulation. Accordingly, the court holds that the challenged regulation, 23 C.F.R. §771.135 (f)(1), is in conflict with and would act to circumvent the affirmative restrictions imposed upon the Secretary of Transportation's authority by an Act of Congress now codified as 49 U.S.C. §1653(f). As the challenged regulation is out of harmony with the Act of Congress and cannot be said to be reasonably related to furthering the objective of that Act of Congress, 23 C.F.R. §771.135 (f)(1) is hereby declared void.

Plaintiffs have further requested an award of attorneys fees. The court will hold its ruling on that issue in abeyance pending the receipt of memoranda from the parties. The parties will have 10 days from the date of this order in which to submit those memoranda.

FINDINGS AND RULINGS

The court finds that irreparable harm will occur to the Lochmere Archaeological District if the proposed Franklin to Laconia, New Hampshire bypass of US 3-NH 11 is constructed without first completing a section 4(f) statement finding that there is no prudent and feasible alternative to the use of land from the District.

The court rules that a section 4(f) statement is required by §4(f) of the department of Transportation Act of 1966, as amended 49 U.S.C. §303 and §18(a) of the Federal-Aid Highway Act of 1968, as amended 28 U.S.C. §138.

The court rules that Department of Transportation regulations 23 CFR §771,135 (f)(1) is declared to be void as it is in conflict with the Acts of Congress now codified as 49 U.S.C. §303 and 28 U.S.C. §138.

A permanent injunction will, therefore, issue forthwith and is attached as an Appendix to this opinion.

August 20, 1983

Martin F. Loughlin
U.S. District Judge

Edward A. Haffer, Esq.
United States Attorney
Office of the Attorney General

THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW HAMPSHIRE

Town of Belmont, et al.

v.

Elizabeth Dole, et al.

C83-241-L

PERMANENT INJUNCTION

This cause came on to be heard on plaintiffs' suit for a permanent injunction, and the court having considered the complaint, the memoranda presented in support and opposition therto, and having heard oral evidence in open court, and it appearing to the court after careful deliberation that the defendants are actually engaged in committing and will continue to commit the acts set forth below, to the irreparable injury of the Lochmere Archaeological District, and the court having made and filed its findings of fact and conclusions of law it is

ORDERED that the defendant Elizabeth Dole, her agents, servants, employees, and all persons in active concert and participation with her are hereby permanently restrained and enjoined, pending the completion of a section 4(f) statement concluding that there is no prudent and feasible alternative to the use of land from the Lochmere Archaeological District, from in any manner taking any action to effectuate federal participation, by providing funding ot otherwise to commit the United States Government or any of its departments or agencies to such participation, in the highway construction described or proposed in the document entitled "Final Environmental Impact Statement, Relocation of U.S. 3-NH 11, Franklin-Laconia, New Hampshire issued by the United States Department of Transportation Federal Highway Administration, numbered FHWA--NH--EIS--77--02--F, such

proposed construction being of approximately 12 miles of highway U.S.3 – N.H. 11 from Franklin, New Hampshire to Laconia, New Hampshire.

August 22, 1983

Martin F. Loughlin
U.S. District Judge

Edward A. Haffer, Esq.
United States Attorney
Office of the Attorney General

§18(a) Federal-Aid Highway Act of 1968 (23 U.S.C. §138)

It is hereby declared to be the national policy that special effort should be made to preserve the natural beauty of the countryside and public park and recreation lands, wildlife and waterfowl refuges, and historic sites. The Secretary of Transportation shall cooperate and consult with the Secretaries of the Interior, Housing and Urban Development, and Agriculture, and with the States in developing transportation plans and programs that include measures to maintain or enhance the natural beauty of the lands traversed. After the effective date of the Federal-Aid Highway Act of 1968, the Secretary shall not approve any program or project which requires the use of any publicly owned land from a public park, recreation area, or wildlife and waterfowl refuge of national, State, or local significance as determined by the Federal, State or local officials having jurisdiction thereof, or any land from an historic site of national, State, or local significance as so determined by such officials unless (1) there is no feasible and prudent alternative to the use of such land, and (2) such program includes all possible planning to minimize harm to such park, recreational area, wildlife and waterfowl refuge, or historic site resulting from such use. In carrying out the national policy declared in this section, the Secretary, in cooperation with the Secretary of the Interior and appropriate State and local officials, is authorized to conduct studies as to the most feasible Federal-aid routes for the movement of motor vehicular traffic through or around national parks so as to best serve the needs of the traveling public while preserving the natural beauty of these areas.

(2)

Supreme Court, U.S.
FILED
DEC 11 1985
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-469

In the Supreme Court of the United States

OCTOBER TERM, 1985

TOWN OF BELMONT, NEW HAMPSHIRE,
PETITIONER

v.

ELIZABETH DOLE, SECRETARY OF TRANSPORTATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether a Department of Transportation regulation, which provides that the agency need not make a "4(f)" determination if the Department, after appropriate consultation with historic preservation officials, concludes that an archaeological site is important chiefly for the information it contains and has minimal value for preservation in place, is consistent with Section 4(f) of the Department of Transportation Act of 1966, Pub. L. No. 89-670, 80 Stat. 934 (currently codified at 49 U.S.C. 303).

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In the Supreme Court of the United States

OCTOBER TERM, 1985

No. 85-469

TOWN OF BELMONT, NEW HAMPSHIRE,
PETITIONER

v.

ELIZABETH DOLE, SECRETARY OF TRANSPORTATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 11-22) is reported at 766 F.2d 28. The opinion of the district court (Pet. App. 23-34) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 27, 1985. The petition for a writ of certiorari was filed on September 18, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner contends that the Secretary of Transportation violated Section 4(f) of the Department of Transportation Act of 1966, Pub. L. No. 89-670, 80 Stat. 934 (currently codified at 49 U.S.C. 303), which generally prohibits the use of park land or historic sites for highway projects unless

there is "no prudent and feasible alternative" to such use, when she determined that the archaeological sites at issue in this case are valuable chiefly for the information they contain, which is retrievable, and not for preservation in place.

1. The National Historic Preservation Act (NHPA), 16 U.S.C. 470 *et seq.*, is the primary federal statutory vehicle for the preservation of historic resources. Among other things, the NHPA created the Advisory Council on Historic Preservation (ACHP), an independent federal agency, and called for the designation by the governor of each state of a State Historic Preservation Officer (SHPO). The NHPA also established the National Register of Historic Places, which includes districts, sites, buildings, structures, and objects of national, state, or local significance in American history, architecture, archaeology, and culture. 16 U.S.C. 470a.

Under Section 106 of the NHPA, 16 U.S.C. 470f, the Secretary of Transportation must take into account the effect that approval of a highway project will have on properties on or eligible for inclusion on the National Register and must afford the ACHP a reasonable opportunity to comment on the project. The commenting process is governed by regulations promulgated by the ACHP (36 C.F.R. Pt. 800). The procedures established therein call for consultation between the Secretary (through the Federal Highway Administration) and the SHPO, followed by ACHP review, to determine whether the project will adversely affect property on or eligible for inclusion on the National Register (36 C.F.R. 800.4(b) and (c)). If the consultation process supports a finding that no adverse effect will result, the Secretary has met her responsibilities under Section 106, and the project may proceed (36 C.F.R. 800.6(a)).

Section 4(f) of the Department of Transportation Act of 1966, enacted on the same day as Section 106 of the NHPA, establishes two prerequisites to Department of Transportation approval of transportation programs or projects "requiring the use of * * * land of an historic site of national, State or local significance (as determined by the Federal, State, or local officials having jurisdiction over the * * * site)." 49 U.S.C. 303.[1] First, there must be "no prudent and feasible alternative to using that land." Second, the program or project must include "all possible planning to minimize harm" to the site resulting from the use. *Ibid.*

In 1980, DOT promulgated 23 C.F.R. 771.135(f)(1) in an effort to coordinate and reconcile Section 106 of the NHPA with Section 4(f). The regulation states that, in general, Section 4(f) applies to archaeological sites on or eligible for inclusion on the National Register. However, Section 4(f) does not apply if the Federal Highway Administration, after consultation with the SHPO and the ACHP, determines that "the archaeological resource is important chiefly for the information it contains and has minimal value for preservation in place" (23 C.F.R. 771.135(f)(1)). If such a determination is made, the archaeological resources may be recovered in accordance with an appropriate "resource recovery plan" (*ibid.*) developed in compliance with 36 C.F.R. Pt. 800. By differentiating archaeological resources possessing in-place value from those that do not, the regulation limits application of Section 4(f) to those situations presenting the land use concerns addressed by that statute.

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[1]Section 4(f) of the Department of Transportation Act of 1966, Pub. L. No. 89-670, 80 Stat. 934, was originally codified at 49 U.S.C. (1970 ed.) 1653(f). Section 7(b) of Pub. L. No. 97-449, 96 Stat. 2444, repealed 49 U.S.C. (1970 ed.) 1653(f) and recodified that statute, without substantive change, as 49 U.S.C. 303. Section 18(a) of the Federal-Aid Highway Act of 1968, Pub. L. No. 90-495, 82 Stat. 823 (currently codified at 23 U.S.C. 138), is essentially identical to Section 4(f). All of these provisions will be referred to herein as "Section 4(f)."

2. Petitioner brought this action in the United States District Court for the District of New Hampshire, contending that the Secretary was required to prepare a "Section 4(f) determination" regarding the lack of prudent and feasible alternatives to the "use" of the Lochmere Archaeological District for the construction of a proposed bypass of U.S. 3-N.H. 11. Specifically, petitioner contended that the Secretary's archaeological regulation, 23 C.F.R. 771.135(f)(1), was invalid because it allegedly permitted the Secretary to escape her obligations under Section 4(f).

Federal and state highway officials determined that the proposed bypass is needed to alleviate traffic congestion on the existing highway and to prevent accidents resulting from that congestion. Pet. App. 12-13, 24. The bypass project, for which the State of New Hampshire sought federal funding from the Department of Transportation, would supplement the present roadway with a four-lane limited access highway through a generally rural area that includes the Lochmere Archaeological District. *Id.* at 24. Pursuant to the challenged regulation, and in view of the facts below, DOT determined that Section 4(f) was inapplicable to the proposed project.

The Lochmere Archaeological District is an example of an archaeological resource with minimal in-place value. The District, comprising approximately 90 acres, contains sites of prehistoric Native American occupation and historic Euro-American settlement and industry, and it is listed on the National Register. Pet. App. 13, 25. In forms submitted in support of the District's nomination to the National Register, the significance of the District was described as "strictly archaeological" (*id.* at 25). The district court, drawing upon those same nomination forms, described the area as follows (*ibid.*):

> There are no historic buildings within the District. Rather, it is dotted with abandoned cellarholes (some of which are only visible when the water is low) and various stone artifacts. The District is hardly in a pristine state. "Areas of major disturbance" include "house lots, landscaped areas, railroad cut and fill, powerlines and roads; a new hydro-electric facility on the east side of the river is now under construction by state and federal agencies."

In a December 11, 1980 letter to the New Hampshire state highway authorities, the New Hampshire SHPO acknowledged Lochmere's potential eligibility for the National Register.[2] Nonetheless, he stated his opinion that "the significance of the site will lie in the data it contains and retrieval of the data is the recommended course of action that will serve the interest of historic preservation." C.A. App. 83. The SHPO requested that his determination be "construed as a finding of 'No adverse effect on archaeological resources' " within the meaning of 36 C.F.R. Pt. 800. C.A. App. 83. He conditioned that request on the assurance that certain commitments to an archaeological resource recovery program satisfactory to state and federal preservation authorities be included in the project's final Environmental Impact Statement (FEIS) and satisfied before the onset of construction. C.A. App. 83-84.

The state highway agency consented to the SHPO's condition and thereafter requested and received the Federal Highway Administration's concurrence in the "no adverse effect" finding. The Federal Highway Administration also agreed with the state agency that a Section 4(f) evaluation was not required. C.A. App. 178.

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[2]The District was nominated for inclusion on the National Register as the result of surveys conducted during the assessment of the environmental impacts of the bypass project. It was placed on the Register on November 1, 1982. Pet. App. 24-26.

The FEIS for the bypass project was completed in June 1981. The FEIS discussed three intensive surveys of archaeological resources undertaken in the Lochmere area. The FEIS noted that, as determined by the SHPO, the value of the site lies primarily in the resources it contains rather than in the site itself and acknowledged the resource recovery commitments made by the state highway agency. FEIS, § F, ch. 13. Accordingly, the FEIS concluded that the project would not "use" land of archaeological significance so as to require preparation of an evaluation pursuant to Section 4(f). FEIS, § J.

The FEIS was furnished to the ACHP in July 1981. That agency offered no objection to the decision to recover the archaeological resources or to the determination that no Section 4(f) statement was required with respect to the Lochmere Archaeological District. Thus, as required under 23 C.F.R. 771.135(f)(1), the Secretary consulted the appropriate state and local preservation authorities and determined, without reference to Section 4(f), that the project would not adversely affect property subject to Section 106 of the NHPA.

The district court rejected the Secretary's reconciliation of Section 106 of the NHPA and Section 4(f), concluding that 23 C.F.R. 771.135(f)(1) is "void" as in conflict with the statutory mandate of Section 4(f). Pet. App. 23-34. The district court enjoined the bypass project pending preparation of a 4(f) determination. Pet. App. 35-36.

The court of appeals reversed, finding no conflict between the regulation and Section 4(f)'s language or purpose. Pet. App. 11-22. Moreover, the court of appeals concluded that the regulation furthers the preservationist goals of Section 4(f) by promoting, in appropriate instances, resource recovery in accordance with regulations promulgated under the NHPA. Pet. App. 18-19. Petitioner's challenge to

DOT's compliance with 23 C.F.R. 771.135(f)(1) in this particular case was remanded to the district court. Pet. App. 20.

ARGUMENT

The decision of the court of appeals is correct, does not conflict with any decision of this Court or any other court of appeals, and does not warrant further review.

1. The single issue entertained by the court of appeals was whether the challenged regulation is reasonable and consistent with Section 4(f). Pet. App. 15. Petitioner's contention that the Lochmere District has "associational" or in-site significance (Pet. 8-9) and therefore does not fall within the regulatory exemption from Section 4(f) has nothing to do with the issue decided by the court of appeals and must be raised before the district court on remand, if at all. See Pet. App. 20.[3]

The issue actually decided by the court of appeals—the validity of 23 C.F.R. 771.135(f)(1) under Section 4(f)—was a question of first impression.[4] Contrary to petitioners'

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[3]In any event, Lochmere's status as a "district" included on the National Register does not denote in-site value. A "district" on the National Register is defined at 36 C.F.R. 60.3(d) as

> a geographically definable area, urban or rural, possessing a significant concentration, linkage, or continuity of sites, buildings, structures, or objects united by past events or aesthetically by plan or physical development. A district may also comprise individual elements separated geographically but linked by association or history.

Thus, the Lochmere Archaeological District is a geographic designation indicating only that a "concentration * * * of sites * * * or objects" of archaeological interest lies within the District's lines.

[4]In the only other reported case citing the regulation, its validity was not at issue. *Arizona Past & Future Foundation* v. *Lewis*, 722 F.2d 1423, 1427 (9th Cir. 1983). Petitioner implies (Pet. 9) that the regulation was rejected in *Benton Franklin Riverfront Trailway & Bridge Comm.* v. *Lewis*, 701 F.2d 784 (9th Cir. 1983). In fact, that case did not involve archaeological resources at all, and the validity of DOT's archaeological regulation was not even remotely at issue.

vigorous assertion (Pet. 6), the court of appeals' decision does not conflict with *Citizens to Preserve Overton Park, Inc.* v. *Volpe,* 401 U.S. 402 (1971), which dealt with the propriety of, and standards for, judicial review of Section 4(f) determinations under the Administrative Procedure Act, 5 U.S.C. 701 *et seq.* While *Overton Park* discussed the general import of Section 4(f)'s mandate, the Court did not there decide the scope of that Section's application to specific cases. Cf. *Concerned Citizens on I-190* v. *Secretary of Transportation,* 641 F.2d 1, 7 (1st Cir. 1981).

The regulation at issue reflects the Secretary's view that Section 4(f) does not apply to archaeological sites if the archaeological resource is important chiefly for the information it contains and may be recovered in accordance with a plan developed in compliance with 36 C.F.R. Pt. 800. As a form of "agency action" under the APA, 5 U.S.C. 551(13), the regulation may be voided only if its terms are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. 706(2)(A). Under this standard, a court may not set aside a regulation that has a rational basis and does not exceed or violate statutory authority. *FCC* v. *National Citizens Committee for Broadcasting,* 436 U.S. 775, 802-803 (1978).

The court of appeals correctly determined that 23 C.F.R. 711.135(f)(1) is reasonable and not contrary to Section 4(f). See, *e.g., Chevron U.S.A. Inc.* v. *NRDC,* No. 82-1005 (June 25, 1984); *Schweiker* v. *Gray Panthers,* 453 U.S. 34, 43-44 (1981); *Batterton* v. *Francis,* 432 U.S. 416, 424-426 (1977). The administrative history of the regulation explains the unique factors that come into play when archaeological resources are involved and discloses a reasoned effort to harmonize the procedures for compliance with Section 106 of the NHPA and Section 4(f) (45 Fed. Reg. 71976 (1980) (emphasis added)):

> Frequently, the consultation required by section 106 results in a determination that data recovery is the appropriate form of mitigation for the archaeological site. *Such determinations are typically made when the recovery of the material contained in or on the site renders more valuable information than leaving such material at the specific location.* Applying section 4(f) to archaeological sites where data recovery is appropriate would impose the section 4(f) test to sites for which all interested agencies have agreed that removal of the archeological material is in the best public interest. *This regulation incorporates current DOT policy by applying section 106 and section 4(f) to archeological sites sequentially. If data recovery under section 106 is appropriate, then section 4(f) would not apply, since recovery results in the removal of materials which make the site significant for purposes of section 4(f).* It should be noted that section 4(f) continues to apply to archaeological sites on or eligible for the National Register where the site has significance for reasons other than the materials contained.

As contemplated by DOT and as applied in this case, the regulation operates as a screening mechanism preliminary to Section 4(f) compliance procedures. It designates a subset of historic sites—those containing resources determined to have "minimal value for preservation in place"—that would otherwise be subject to Section 4(f)'s requirements. For this subset, the critical question is one of resource preservation, not land use. If analysis under Section 106 of the NHPA shows that the proposed construction project can be accomplished without adversely affecting the significant archaeological values involved, that is, if the *artifacts* may be safely relocated, there is no reason in law or policy to apply Section 4(f) so as to prohibit use of the *site* for highway purposes. Properly understood, the

regulation does not, as petitioner claims (Pet. 7), invert the requirements of Section 4(f) by calling for harm-minimization efforts or land use prohibitions prior to any study of feasible and prudent alternatives. Instead, it provides for appropriate resource preservation when the "significance" of an historic site may be effectively extracted from the land.

2. As demonstrated above, the regulation differentiates between archaeological resources based on their in-place value: only those without in-place significance undergo the Section 106 analysis triggered by the regulation. This approach is entirely consistent with the goals of both the NHPA and Section 4(f). Section 4(f) was primarily intended to preserve public parks, recreation areas, wildlife and waterfowl refuges, and historic sites. See 49 U.S.C. 303(c). Congress's principal concern in enacting the statute was to assure that, to the extent possible, highways and other federally-funded transportation projects would not diminish or destroy the recreational and aesthetic qualities of the protected lands. By contrast, the sole focus of the NHPA is the protection of historic resources. Accordingly, the NHPA, not Section 4(f), is Congress's primary enactment to preserve artifacts that fall within the exemption created by 23 C.F.R. 771.135(f)(1).

Petitioners seek invalidation of 23 C.F.R. 771.135(f)(1) and mandatory application of Section 4(f) in this case in spite of the absence of any in-place value in the archaeological resources in the Lochmere District. However, the Section 106 compliance procedures triggered by the regulation provide for full protection of the District's archaeological resources and adequate consultation with both state and local preservation authorities. Substitution of Section 4(f)'s mandate for those procedures would serve no purpose; indeed, recovery and relocation of significant artifacts from a site that is "hardly pristine" and already littered with

"[a]reas of major disturbance" (Pet. App. 25) is in the best interest of archaeological preservation. The court of appeals correctly took these considerations into account (Pet. App. 16-19).

In any event, the decision in this case is not of sufficient importance to warrant this Court's review. The challenged regulation recognizes only carefully limited circumstances in which Section 4(f) does not apply and, as the court of appeals observed, it contains sufficient substantive and procedural safeguards to prevent abuse. Pet. App. 19. Even the district court conceded that the regulation is sensible. *Id.* at 32. The question of its validity was correctly decided by the court of appeals, and it has not arisen elsewhere.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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No. 85-469

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

TOWN OF BELMONT, NEW HAMPSHIRE,

Petitioner,

v.

ELIZABETH DOLE, SECRETARY OF THE UNITED STATES DEPARTMENT OF TRANSPORTATION,

Respondent.

On Petition For a Writ of Certiorari to the United States Court of Appeals for the First Circuit

BRIEF OF THE NATIONAL TRUST FOR HISTORIC PRESERVATION IN THE UNITED STATES, THE SOCIETY OF PROFESSIONAL ARCHEOLOGISTS, AND THE AMERICAN SOCIETY FOR CONSERVATION ARCHAEOLOGY, AS *AMICI CURIAE* IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the First Circuit erred in upholding a Department of Transportation regulation exempting certain archeological sites from the protection of Section 4(f) of the Department of Transportation Act, when the regulation is fundamentally inconsistent with the statute and therefore invalid?

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INTRODUCTION

Pursuant to Rule 36 of the Rules of this Court, the National Trust for Historic Preservation in the United States, the Society of Professional Archeologists, and the American Society for Conservation Archaeology respectfully submit this brief as *amici curiae* in support of the petition for a writ of certiorari to the United States Court of Appeals for the First Circuit. Consent to appear as *amici* has been obtained from the United States and from the petitioner, Town of Belmont, as evidenced by letters filed with the Clerk of this Court.

INTEREST OF THE *AMICI CURIAE*

The National Trust for Historic Preservation in the United States was chartered by Congress in 1949 to protect and defend America's historic resources. As a private, nonprofit, charitable and educational corporation, the National Trust's congressional mandate is to further the historic preservation policy of the United States and to preserve sites, buildings and objects significant in American history and culture. 16 U.S.C. § 468; *see id.* §§ 461-467. The National Trust has approximately 150,000 individual members and 1500 member organizations. The National Trust's Chairman is by statute a member of the Advisory Council on Historic Preservation, an independent federal agency, which is required to comment on all federal undertakings affecting historic resources. *Id.* §§ 470f, 470i(a)(8). The Advisory Council's duties also include reviewing the policies and programs of other federal agencies to ensure consistency with the historic preservation policy adopted by Congress. *See id.* §§ 470, 470j. The National Trust's expertise on historic preservation issues is nationally recognized, and its strong commitment to the protection of archeological resources is a significant priority for the Trust.

The Society of Professional Archeologists (SOPA) is a national, nonprofit archeological organization incorporated under Illinois law. The purpose of SOPA is to promote compliance

with professional standards in the study and protection of archeological resources. SOPA accepts into its membership individuals who have met rigorous educational and practical criteria, and have attained a level of accomplishment that merits certification as a professional archeologist. Members are obligated to comply with the professional Code of Ethics and Standards of Research Performance published by SOPA. Among the ethical standards is a requirement that the membership "actively support conservation of the archeological resource base."

The American Society for Conservation Archaeology is a nonprofit membership organization, incorporated under Nevada law, which is dedicated to the conservation of America's archeological heritage, and to promoting the conservation ethic within the archeological profession. Membership in the American Society for Conservation Archaeology is open to individuals and organizations interested in the conservation of archeological resources and in promoting responsible cultural resource management.

The *amici curiae* strongly oppose the decision of the First Circuit in *Belmont v. Dole* because the decision was based on a misinterpretation of the law and a misunderstanding of archeological principles. If the regulation upheld by the First Circuit remains in effect, the result will be the devastating loss of America's irreplaceable archeological resources.

RELEVANT STATUTES AND REGULATIONS

Section 4(f) of the Department of Transportation Act of 1966, 49 U.S.C. § 303, prohibits the Secretary of Transportation from approving any federally funded project that requires the use of any historic site, public parkland, recreational area, or wildlife refuge, *unless* (1) there is no feasible and prudent alternative to the use of the site and (2) the project includes all possible planning to minimize harm to the protected areas.

Section 4(f) of the Department of Transportation Act is virtually identical to Section 18(a) of the Federal-Aid Highway

Act, 23 U.S.C. § 138. The two statutes are referred to collectively as "Section 4(f)." Section 4(f) provides as follows:

> [T]he Secretary [of Transportation] shall not approve any program or project which requires the use of any publicly owned land from a public park, recreational area, or wildlife and waterfowl refuge of national, State, or local significance as determined by the Federal, State, or local officials having jurisdiction thereof, or any land from an historic site of national, State, or local significance as so determined by such officials unless (1) there is no feasible and prudent alternative to the use of such land, and (2) such program includes all possible planning to minimize harm to such park, recreational area, wildlife and waterfowl refuge, or historic site resulting from such use.

23 U.S.C. § 138; 49 U.S.C. § 303.[1]

The regulation at issue in this case, which was promulgated by the Department of Transportation (DOT), allows the DOT to eliminate compliance with Section 4(f) in cases involving archeological sites, if the DOT determines that the archeological resource at stake is "important chiefly for the information it contains and has minimal value for preservation in place." The regulation provides as follows:

> Section 4(f) applies to all archeological sites on or eligible for inclusion on the National Register [of Historic Places], including those discovered during construction, unless the [Federal Highway] Administration, after consultation with the State Historic Preservation Officer and the Advisory Council on Historic Preservation, determines that the archeological resource is important chiefly for the information it contains and has minimal value for preser-

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[1]On January 12, 1983, the provisions of Section 4(f) (formerly 49 U.S.C. § 1653(f)) were recodified as 49 U.S.C. § 303, as part of an overall recodification of Title 49. Pub. L. No. 97-449, 96 Stat. 2419 (1983). The recodification makes "no substantive change" in any provisions of that Title. 128 Cong. Rec. H9543-44 (Dec. 13, 1982)(citing Trailer Marine Transport Corp. v. Federal Maritime Comm'n, 602 F.2d 379, 383 (D.C. Cir. 1979)).

> vation in place. Such archeological resources which do not warrant preservation in place may be recovered in accordance with a resource recovery plan developed in compliance with 36 CFR Part 800.

23 C.F.R. § 771.135(f)(1).

Section 106 of the National Historic Preservation Act, 16 U.S.C. § 470f, requires that, prior to the approval of any federally assisted undertaking, the federal agency must "take into account" the effect of the undertaking on any historic site or district, and shall afford the Advisory Council on Historic Preservation an opportunity to comment on the project. Section 106 provides in pertinent part as follows:

> The head of any Federal agency having direct or indirect jurisdiction over a proposed Federal or federally assisted undertaking in any State . . . shall, prior to the approval of the expenditure of any Federal funds on the undertaking or prior to the issuance of any license, as the case may be, take into account the effect of the undertaking on any district, site, building, structure, or object that is included in or eligible for inclusion in the National Register [of Historic Places]. The head of any such Federal agency shall afford the Advisory Council on Historic Preservation . . . a reasonable opportunity to comment with regard to such undertaking.

16 U.S.C. § 470f.

STATEMENT OF THE CASE

This case arises from a proposal by the New Hampshire Department of Public Works and Highways to construct a 12-mile bypass from Franklin to Laconia, New Hampshire, passing through the Towns of Belmont and Tilton. The proposed four-lane highway would also require the use of land from the Lochmere Archeological District, a 90-acre historic district, which the U.S. Department of the Interior listed in the National Register of Historic Places in 1982. The district has both prehistoric and historic significance, with at least 13 sites of

prehistoric Native American occupation and 18 sites of Euro-American settlement and industry.[2] The district was nominated and listed in the National Register for the significance of its historical association with the early settlement of Belmont and Tilton, and for its association with the early industrial use of New Hampshire's major rivers.

The U.S. Department of Transportation prepared a draft Environmental Impact Statement (EIS) for the project in 1977, and the Secretary of Transportation approved the final EIS in June 1981. During the environmental review process, the Department of Transportation made a determination not to comply with Section 4(f) of the Department of Transportation Act, 49 U.S.C. § 303. The Department took the position that Section 4(f) did not apply to the project, relying on the challenged regulation, which allows the Department to avoid complying with Section 4(f) in cases where the threatened historic resource is an archeological site, if the Department makes certain preliminary findings about the site. 23 C.F.R. § 771.135(f)(1).

On May 9, 1983, the Towns of Belmont and Tilton filed suit in the United States District Court for the District of New Hampshire, challenging the archeological regulation as invalid and seeking to enjoin the project. The district court on August 20, 1983 declared the regulation invalid on the ground that it is inconsistent with Section 4(f), and issued a permanent injunction. *Town of Belmont v. Dole*, No. C83-241-L (D.N.H. Aug. 20, 1983). The New Hampshire Department of Public Works and Highways, a defendant in the district court, chose not to appeal the decision. The Department of Transportation, however, appealed the case and the First Circuit reversed on June 27, 1985. *Town of Belmont v. Dole*, 766 F.2d 28 (1st Cir. 1985). The Town of Belmont filed its petition for certiorari on September 18, 1985.

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[2]The National Register of Historic Places includes archeological sites of both historic and prehistoric significance. 36 C.F.R. § 60.4. These sites will be referred to collectively as "historic."

SUMMARY OF THE ARGUMENT

This Court should grant the petition for certiorari because the regulation upheld by the First Circuit's opinion is in direct conflict with Section 4(f) of the Department of Transportation Act, 49 U.S.C. § 303, as construed by this Court in *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402 (1971). Section 4(f) prohibits the Secretary of Transportation from approving any federally funded project, such as the highway at issue, which requires the use of land from any historic site, unless there is no feasible and prudent alternative to the use of the site and the project includes all possible planning to minimize harm.

The regulation upheld by the First Circuit flagrantly circumvents this explicit congressional limitation on the authority of the Secretary of Transportation to approve highway projects. The regulation creates an exemption to the statute for archeological sites by allowing the Department of Transportation to choose to excavate sites rather than find alternative routes to avoid destruction of the sites. In effect, the regulation allows the Department to decide whether or not to comply with a statute that Congress intended to be mandatory. Since the regulation cannot be reconciled with the statute, the First Circuit's decision must be reversed.

The decision below already is being misinterpreted by the lower courts, and is in direct conflict with cases from other circuits. It is in conflict with the Ninth Circuit's decision in *Benton Franklin Riverfront Trailway and Bridge Committee v. Lewis*, 701 F.2d 784 (9th Cir. 1983), in which the court recognized that the entire purpose of Section 4(f) would be defeated if the Department were allowed to remove structures and objects from historic sites, thereby causing the sites to lose their historic significance and rendering Section 4(f) inapplicable. Yet a procedure to circumvent Section 4(f) by removing objects from historic sites is precisely what the First Circuit has sanctioned in upholding the disputed regulation.

The decision is also in conflict with the Fifth Circuit's opinion in *Louisiana Environmental Society, Inc. v. Coleman*, 537

F.2d 79 (5th Cir. 1976), in which the court held that it is impermissible to consider the "degree" of harm to a protected site in determining whether Section 4(f) applies. *Any* use, "regardless of its degree," mandates compliance with Section 4(f). *Id.* at 84. As a matter of archeological principle, any excavation of an archeological site necessarily harms the site. The First Circuit has improperly allowed the degree of harm to be considered by permitting archeological excavations, which use and harm historic sites, without requiring Section 4(f) compliance.

The Eleventh Circuit, too, is in conflict with the First Circuit's ruling. In *Druid Hills Civic Association v. Federal Highway Administration*, 772 F.2d 700 (11th Cir. 1985), the court confirmed that "Congress enacted *no exceptions*" to the requirements of Section 4(f). *Id.* at 716 n.19 (emphasis added). The First Circuit, on the other hand, has permitted just such an exception to the statute — an exception written by the Department of Transportation itself.

Finally, the First Circuit's opinion is fundamentally inconsistent with sound archeological and preservation principles, and will result in a significant loss of the cultural resources that Congress intended to protect by enacting Section 4(f). The First Circuit's opinion was apparently based on its assumption that the disputed regulation would benefit archeological sites by encouraging the excavation of artifacts from the sites. That assumption is absolutely wrong. In reality, the regulation promotes and encourages the systematic destruction of archeological sites by highway construction. Although removal and preservation of individual artifacts is usually the least harmful method of destroying an archeological site, it is nevertheless destruction rather than preservation. Preservation of a site in place is *always* preferable to excavation. The First Circuit's misunderstanding of this basic principle of archeology (rendered without the benefit of input from historic preservation or archeological experts such as the *amici*), and its misunderstanding of the law under Section 4(f), will lead to the loss and destruction of irreplaceable archeological resources nationwide.

Accordingly, this Court should grant the petition for certiorari and should reverse the decision of the First Circuit.

REASONS FOR GRANTING THE WRIT

1. The First Circuit's Decision is in Direct Conflict with Section 4(f) of the Department of Transportation Act, as Construed by This Court in *Overton Park*.

Section 4(f) of the Department of Transportation Act, 49 U.S.C. § 303, prohibits the Secretary of Transportation from approving any federally funded project that requires the use of any historic site, public parkland, recreational area, or wildlife refuge, *unless* (1) there is no feasible and prudent alternative to the use of the site and (2) the project includes all possible planning to minimize harm to the protected areas. This statute is one of the most stringent environmental and historic preservation laws ever enacted. Section 4(f) is "a plain and explicit bar to the use of federal funds" for highway projects that affect historic sites and parks. *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 411 (1971).

As this Court has recognized, the very existence of this statute indicates that Congress intended the protection of historic sites and parklands to be given "paramount importance" in the planning and approval of federal highway projects. *Id.* at 412-13. Accordingly, the Department of Transportation may never use these protected sites for highway projects unless there are "*truly unusual factors* present ir a particular case or the cost or community disruption resulting from alternative routes reache[s] *extraordinary magnitudes*." *Id.* at 413 (emphasis added).

The duties imposed by Section 4(f) are *not* a matter of agency discretion. *Id.* at 411-13. If there is a feasible and prudent alternative to the use of Section 4(f) resources, the Department of Transportation *must* adopt that alternative. *Id.; Louisiana Environmental Society, Inc. v. Coleman*, 537 F.2d 79, 84 (5th Cir. 1976). Accordingly, the Department has strong incentive

to avoid the initial application of Section 4(f) whenever possible.

The First Circuit's opinion is contrary to the "plain and explicit" language of Section 4(f),[3] as construed by this Court in *Overton Park*, because it allows the Department of Transportation itself to decide whether or not to comply with a statute that Congress intended to be mandatory. The regulation upheld by the First Circuit creates an exemption to the statute for archeological sites by allowing the Department of Transportation to choose to excavate sites rather than find alternative routes to avoid destruction of sites. Accordingly, the regulation itself is invalid because it cannot be reconciled with the language of the statute. *See Securities and Exchange Commission v. Sloan*, 436 U.S. 103, 121-23 (1978).

The First Circuit attempted to justify its decision to uphold the archeological regulation by asserting that the regulation contains "sufficient substantive and procedural safeguards to prevent its being applied in a manner that would undercut its, and § 4(f)'s, preservationist goals." 766 F.2d at 33. The very suggestion that "safeguards" could compensate for the creation of a major exemption from the statute is preposterous. The court's rationale implicitly concedes the judicial erosion of Section 4(f). The three examples of "safeguards" cited by the court further illustrate the court's basic misunderstanding of the law and of archeological principles.

First, the court stated that the regulation does not apply to archeological sites that have significance "in place." *Id.* But the court failed to recognize that the determination of "significance in place" lies solely in the hands of the Department of Transportation, which has every incentive to decide that a site need *not* be preserved in place in order to avoid complying with Section

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[3]As this Court recognized in *Overton Park*, the courts must look to the strict language of the statute itself for the legislative intent, since the legislative history of Section 4(f) is ambiguous. *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. at 412 n.29.

4(f).[4] Although the regulation requires the Department to consult with the State Historic Preservation Officer and the Advisory Council on Historic Preservation in making this determination, their comments are not binding. *See* 36 C.F.R. § 800.6. Ultimately, this first "safeguard" is no more than a statement that the exception created by the Department is limited. But it is still an exception, which is fundamentally inconsistent with the statute itself and with this Court's opinion in *Overton Park*.

The second "safeguard," according to the First Circuit, is that the regulation does not apply unless a "resource recovery plan" is developed in consultation with the Advisory Council on Historic Preservation and the State Historic Preservation Officer. 766 F.2d at 33. Ironically, the Department of Transportation has proposed amending the regulation to omit this "safeguard" altogether. 48 Fed. Reg. 34,894, 34,906 (1983). Even the existing regulation does not make such a plan mandatory; it merely provides that the artifacts "*may*" be recovered in accordance with a plan. 23 C.F.R. § 771.135(f)(1). Archeological excavations undertaken by the Department, even if pursuant to a "plan," are usually conducted under conditions that create tremendous pressure to accomplish the hastiest possible excavation of the site. The current regulation includes no substantive standards for recovery plans, but simply refers to the procedural regulations of the Advisory Council.

In relying on this rationale, it appears that the First Circuit has confused Section 4(f) with Section 106 of the National

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[4]As the district court below recognized, the Secretary of the Interior, *not* the Secretary of Transportation, has jurisdiction to determine whether sites have historic significance. Petition for Cert. at 30. "[T]he Secretary of the Interior's decision to include [a district] on the National Register of Historic Places invokes all of the protections section 4(f) was designed to afford. Insofar as the Secretary of Transportation's regulation would act, in this case, to strip the District of those protections . . . the regulation is not only "out of harmony" with the Act of Congress, it is in direct opposition to the Act." *Id.* at 32.

Historic Preservation Act, 16 U.S.C. § 470f — a very different historic preservation statute. Section 4(f) contains a mandatory prohibition on the use of historic sites unless very strict criteria are satisfied. Section 106, on the other hand, provides a comparatively weak consultation process with no substantive restriction on the decisions made by the agency. It merely requires the agency to "take into account" the effect of its actions on historic sites. Although Section 106 requires the agency to consult with the State Historic Preservation Officer and the Advisory Council — as does the regulation at issue in this case — the agency is under no obligation to comply with their recommendations. *See* 36 C.F.R. § 800.6. The First Circuit, by allowing an optional consultation procedure to replace the strict substantive standards that would otherwise protect archeological sites, has diluted the fundamental essence of Section 4(f) and has contravened the explicit mandate of Congress and of this Court in *Overton Park*.

The third "safeguard" identified by the First Circuit was nothing more than the court's own assertion that all state and federal officials had agreed that the disputed site in Belmont did not warrant preservation in place. 766 F.2d at 31. This statement is simply wrong.[5] There is absolutely no evidence in

[5]The First Circuit based its assumption on the claim that "DOT says they are in agreement." 766 F.2d at 33. This statement represents a complete misunderstanding of the facts. The Department of Transportation alleged in its brief that there had been "no objection" by the Advisory Council, but admitted that it had not yet completed the process of consulting the Council. (Brief at 14-15.) Since the Advisory Council had issued no comments at all on the proposal, the Council could hardly be characterized as agreeing that the regulation applies.

The First Circuit went on to suggest that, if there were a disagreement between DOT and the SHPO or Advisory Council about whether a site merited preservation "in place," Section 4(f) would apply. 766 F.2d at 33 (citing *Stop H-3 Ass'n v. Coleman*, 533 F.2d 434, 441-42 (9th Cir.), *cert. denied*, 429 U.S. 999 (1976)). Although the First Circuit correctly stated the law under *Stop H-3*, the court failed to point out that DOT's own regulations are in direct conflict with *Stop H-3*. The DOT regulations provide that, in the event of a disagreement as to the significance of an historic site, DOT is allowed to determine that Section 4(f) does *not* apply. 23 C.F.R. § 771.135(c). Thus the court's own language in *Belmont*, concurring with the *Stop H-3* case, suggests that this section of the DOT regulations is invalid.

the record that the Advisory Council had agreed to such a determination. Even such an agreement, however, would not preclude this Court from determining that the regulation is inconsistent with Section 4(f). *See Securities and Exchange Commission v. Sloan*, 436 U.S. at 118.

Therefore, the "safeguards" cited by the First Circuit in its effort to reconcile this regulation with the statute, besides having no basis in the law, are illusory. They cannot justify the existence of a regulation entirely inconsistent with the statute. Even though the language of Section 4(f) and this Court's guidance in *Overton Park* make clear that the Department of Transportation must comply strictly with Section 4(f), the First Circuit has allowed the Department to promulgate its own exemption from the statute. Accordingly, the Court should grant the petition for certiorari and reverse the decision of the First Circuit.

2. The First Circuit's Decision is in Direct Conflict with Other Circuits.

The *Belmont* opinion is in direct conflict with the opinion of the Ninth Circuit in *Benton Franklin Riverfront Trailway v. Lewis*, 701 F.2d 784 (9th Cir. 1983). The *Benton Franklin* case involved a proposal by the Department of Transportation to demolish an historic bridge over the Columbia River between Oregon and Washington. The defendants argued, as here, that Section 4(f) would not apply because the project would not require the "use" of "land" from an historic site; the bridge structure was not "land," and once it was removed, the land itself would no longer have any historic value. The Ninth Circuit, however, squarely rejected this argument, holding that Section 4(f) cannot be circumvented by removing historic objects from a site:

> [This] reading of § 4(f) is entirely too restrictive and lacks logic. There would be no sense in allowing the destruction and removal of structures on land and then determining whether the "land" will be used by the proposed federal action. The land will often lose its historical significance

> once the object is removed. Hence, we conclude the removal of the Old Truss Bridge . . . would be a use of "land from an historic site" and therefore § 4(f) of the Department of Transportation Act must be satisfied.

Id. at 788.

The First Circuit's opinion in the instant case is directly contradictory to the Ninth Circuit's sound holding in *Benton Franklin*. The First Circuit held that Section 4(f) did not apply to archeological sites covered by the regulation for two reasons: (1) excavating an archeological site would not "use" the site under Section 4(f), since it would not be "adverse" or injure the artifacts; and (2) once a site is excavated it would no longer have historic "significance." The First Circuit's rationale is exactly the reasoning that the Ninth Circuit properly rejected as "too restrictive," "lack[ing] logic," and making "no sense." 701 F.2d at 788. The Ninth Circuit recognized that allowing the Department to take this approach would subvert the entire purpose of Section 4(f).

The challenged regulation allows the Department of Transportation to determine that excavation is appropriate for any archeological site. If excavated, these sites certainly would lose their historic significance, would no longer be listed in the National Register, and would no longer be subject to any protection whatsoever. Furthermore, the Department has demonstrated an inclination to make the determination that excavation is appropriate even in cases where professional archeologists find excavation entirely *in*appropriate. Indeed, if the First Circuit's interpretation of Section 4(f) is allowed to stand, the door will be open to authorize the Department of Transportation to avoid Section 4(f) whenever an historic site can be altered or damaged in such a way that it would lose its historic significance and the statutory protection accompanying that status.

The First Circuit is also in conflict with the Eleventh Circuit, because it has authorized an exception to Section 4(f). In *Druid Hills Civic Association v. Federal Highway Administration*,

772 F.2d 700 (11th Cir. 1985), the court confirmed that "Congress enacted *no exceptions* to the requirements that there be no prudent alternatives to the use of parks and historic sites before the Secretary can approve a project using protected properties." *Id.* at 716 n.19 (emphasis added). The First Circuit, on the other hand, has permitted just such an exception to the statute — an exception written by the Department of Transportation itself. The danger of allowing an agency to create convenient exceptions to legislation is clear.

The nature and extent of the First Circuit's error is such that other courts are likely to misuse or misunderstand the precedent in *Belmont*, which will lead to further erosion of Section 4(f), contrary to the intent of Congress and the explicit guidance of this Court. Indeed, other federal courts have already begun to apply the language of the First Circuit's opinion improperly in other contexts. In *National Trust for Historic Preservation v. Dole*, No. 85-2749 (D.D.C. Oct. 3, 1985), for example, the district court, relying on the First Circuit's decision in *Belmont*, concluded that even a project involving the physical alteration of an historic structure and having an "adverse effect" on the site for purposes of the National Historic Preservation Act, *see* 16 U.S.C. § 470f; 36 C.F.R. § 800.3(b), would not "use" that site within the meaning of Section 4(f). The district court's reasoning squarely contradicts this Court's opinion in *Overton Park*. Therefore, the impact of the First Circuit's decision will reach beyond the many valuable archeological sites that are threatened, and ultimately will serve to allow the destruction of other historic resources as well.

The First Circuit's opinion further threatens to undermine Section 4(f) and *Overton Park* by allowing the consideration of factors that Congress intended to be impermissible. *See Louisiana Environmental Society, Inc. v. Coleman*, 537 F.2d 79 (5th Cir. 1976). As applied and interpreted in the *National Trust* case, *supra*, *Belmont* permits courts to consider the *degree* of harm in determining whether Section 4(f) applies. *National Trust for Historic Preservation v. Dole*, *supra*, slip op. at 7-8. The effect of this interpretation is to impose a

"substantial" use threshold on a statute that by its very terms is absolute. The implied "threshold" theory was firmly rejected by the Fifth Circuit nine years ago as inconsistent with *Overton Park*:

> This is traceable to a mistaken understanding of the impact of *Overton Park*. . . . [T]he Court's strict definition of § 4(f) prudence was not limited to factual situations involving severe takings or destruction of parkland [and historic sites]. Rather, the spirit of *Overton Park* is clearly to the effect that the statute is to be read broadly . . . . Neither did *Overton Park* enunciate any sort of substantial taking threshold for the applicability of § 4(f). The statute explicitly states that it is applicable whenever parkland will be "used for a highway project."
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> . . . If courts were to interpret this section to permit an initial appraisal of whether the use was substantial, it would infuse consideration of elements (such as the degree of harm . . .) which Congress did not want considered when it said, if there is another way, take it. *Any* . . . use, *regardless of its degree*, invokes § 4(f).

Louisiana Environmental Society, Inc. v. Coleman, 537 F.2d 79, 84 (5th Cir. 1976)(emphasis added).

The circuit courts have interpreted Section 4(f) strictly in response to the Department of Transportation's continual challenges to the statutory limitations on its authority. It is critical that the First Circuit's decision be reviewed by this Court, and that the contested regulation be invalidated as inconsistent with Section 4(f).

3. The First Circuit's Decision is Diametrically Opposed to Sound Archeological and Preservation Principles, and Will Result in a Significant Loss of the Cultural Resources that Congress Intended to Protect.

The First Circuit's holding is based on the court's assumption that "the 'archeological regulation' in fact furthers the statute's preservationist goals." 766 F.2d at 30. Nothing could be further

from the truth. Excavation of an archeological site does *not* constitute "preservation." On the contrary, even formal excavation by a qualified archeologist is a form of total site destruction. Excavation should be carried out only as a last resort. If a decision is made to destroy a site, professional excavation is the best method to mitigate the harm caused by construction; nevertheless, the results will be the same — irreversible site destruction rather than preservation.

Archeological standards dictate that preservation of a site in place is preferable to excavation for several reasons. First, the value of an archeological site is never limited to the artifacts contained within it (contrary to the assumption of the First Circuit and of the DOT in its regulation). Archeological analysis requires systematic scientific study of the site as a whole. Such study centers not only on artifacts themselves, but it also focuses on a wide variety of surrounding physical remains such as snail shells, pollen grains, animal bones, carbonized seeds, wood samples and a whole host of ancillary data. In addition, the site's relationship to other sites in the surrounding area is critical. Thus, *any* excavation, no matter how carefully carried out, will destroy a large part of the contextual information that makes the site valuable as a depository of cultural remains.

Second, as members of a scholarly discipline, archeologists recognize that knowledge of techniques and methods of archeology are constantly improving. Several of the techniques now considered essential to a professional excavation have been developed only within the last ten years. Without question, techniques in the future will allow archeologists to obtain far more information from each site than would be possible if excavation were conducted today. Therefore, archeological sites should be preserved in place for as long as possible to ensure that the most advanced archeological techniques are brought to bear if excavation becomes necessary. The First Circuit's failure to recognize the importance of protecting sites in place may seem reasonable to the layman, but is entirely contrary to the most basic professional standards of archeology.

The First Circuit assumed that the term "strictly archeological" value (used to describe the Lochmere Archeological District) meant that the significance of the site was limited to its artifacts, as opposed to their context. This assumption is wrong.[6] While artifacts may have monetary value or contribute to a museum collection, an intact archeological site is *always* more valuable than the excavated artifacts. The DOT regulation utterly disregards this fundamental principle.

An archeological site is eligible for the National Register of Historic Places if it meets certain criteria, which are established by the Secretary of the Interior in consultation with national archeological associations. 16 U.S.C. § 470a.[7] Individual objects, including excavated artifacts, may be listed. *See* 36 C.F.R. § 60.3(j). But an archeological site is listed because it exists as a complex unit and has the potential to yield important information about the past. The contextual relationship between the artifacts and surrounding features cannot be retrieved as an "object." Only by their location, context and composition do artifacts reveal fully the information they contain about earlier cultures.

When excavation is performed under the tremendous pressure of impending highway construction, the result is the worst

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[6]The Lochmere district itself was listed in the National Register not only for its pure archeological value, but also for the district's "historical association" with the early settlement of Belmont and Tilton and the early industrial use of New Hampshire's major rivers.

[7]The National Register eligibility criteria emphasize the importance of preserving archeological sites "in place." These criteria include:

> The quality of significance in American history, architecture, *archeology*, engineering, and *culture* is present in *districts*, *sites*, buildings, structures, and objects that possess *integrity of location*, design, *setting*, *materials*, workmanship, feeling, and *association* and
>
> . . .
>
> (d) that have yielded, or may be *likely to yield*, *information* important in prehistory or history.

36 C.F.R. § 60.4 (emphasis added).

possible situation for the archeological resources. Archeologists are frequently given unreasonably limited time to salvage whatever they can from a site prior to construction. With grossly inadequate time and financial resources, little can be done to preserve threatened sites.

Archeological sites are non-renewable physical representations of the past. Whenever the written records about the past are incomplete, scholars must rely on buried physical remains to expand society's knowledge of our otherwise undocumented past. Archeological sites are finite in number and, once destroyed, cannot be duplicated or replaced. Therefore, conservation of this resource is paramount and site excavation must be a carefully deliberated option only after all avenues of site protection have been fully explored. Congress has already made the determination that society's interest in preserving these sites outweighs the short-term interest in building highways as quickly and cheaply as possible.

CONCLUSION

For the reasons stated above, this Court should grant the petition for certiorari and should reverse the decision of the First Circuit.

Respectfully submitted,

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